Supreme Court, U.S.
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No. _____

In the
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

John D. Morris, *Petitioner,*

v.

Department of Revenue,
State of Oregon, *Respondent.*

On Petition for a Writ of Certiorari to the
Oregon Supreme Court

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Whether the State of Oregon violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution by denying its citizens and the citizens of other states with an opportunity to appeal an erroneous tax assessment when they do not receive prior notice of the assessment within the prescribed period established by the State of Oregon for appealing tax assessment determinations.

2. Whether the State of Oregon violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution by denying individuals with an opportunity to appeal administrative agency determinations of residency for tax assessment purposes.

LIST OF PARTIES

Only those parties identified in the caption to this petition were parties in the Oregon Tax Court and Supreme Court of Oregon

TABLE OF CONTENTS

QUESTIONS PRESENTED. i

LIST OF PARTIES ii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL PROVISIONS INVOLVED . . . 1

STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 4

REASONS FOR GRANTING THE PETITION 7

I. OREGON'S TAX ASSESSMENT NOTICE PROCEDURES VIOLATE THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT. 8

II. OREGON VIOLATES THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT BY NOT ALLOWING JUDICIAL DETERMINATIONS OF ADMINISTRATIVE RULINGS ON RESIDENCY ON WHICH TAX ASSESSMENTS ARE BASED. 12

TABLE OF CONTENTS - Continued

III. OREGON DOES NOT PROVIDE TAXPAYERS WITH AN OPPORTUNITY TO OBTAIN JUDICIAL REVIEWS OF TAX ASSESSMENTS 16

IV. PETITIONER EXHAUSTED ADMINISTRATIVE REMEDY BEFORE SEEKING JUDICIAL REVIEW 17

CONCLUSION 18

APPENDIX 1a

A. OPINION OF SUPREME COURT OF OREGON VACATING JUDGMENT OF OREGON TAX COURT 1a

B. ORDER OF OREGON TAX COURT 12a

C. OPINION AND ORDER, OREGON DEPARTMENT OF REVENUE 16a

D. DRAFT OPINION AND ORDER OF HEARINGS OFFICER PFEFFERKORN 23a

TABLE OF AUTHORITIES

CASES

Harper v. Virginia Dept. of Taxation,
___ U.S. ___, 113, S.Ct 2510 (1993) 16

McKesson Corp. v. Div. Alcoholic Beverages,
496 U.S. 18, 110 S.Ct. 2238 (1990).....16

Morse v. IRS,
635 F.2d 701 (8th Cir 1980) 9

Phillips v. Commissioner,
283 U.S. 583 (1931) 9, 14

Reich v. Georgia,
1994 WL 675214 (1994) 16

Van Tran v. Dept. Of Rev.,
320 OR 170, 880 P2d 924 (1994), *cert den*
63 USLW 3625 (US 1995) 8, 17

CONSTITUTIONAL PROVISIONS

U.S. Const. amend XIV, § 1 1

STATUTES AND RULES

ORS 305.265 .....1 , 5, 14

ORS 305.295 3

ORS 305.270 .....2, 14, 16, 17

TABLE OF AUTHORITIES - Continued

STATUTES AND RULES - CONTINUED

ORS 305.280 2

ORS 305.445 17

ORS 305.560 14

ORS 305.415(1)(b) 3

OAR 150-350.265(11) 10

John D. Morris respectfully petitions for a writ of certiorari to review the judgment of the Oregon Supreme Court in this case.

OPINIONS BELOW

The opinion of the Oregon Supreme Court (App. at 1a) is reported at _____ (1994). The opinion of the Oregon Tax Court (App. at 12a) is unpublished has been vacated. The administrative decision of the Oregon Department of Revenue is contained in Appendix B (App. at 12a).

JURISDICTION

The Supreme Court of Oregon entered its opinion on March 9, 1995. This petition is, accordingly, filed within the time allowed by law. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides in pertinent part: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTORY PROVISIONS INVOLVED

Oregon Revised Statute 305.265 is entitled **Deficiency**

notices; payment of deficiency; assessment; administrative appeal; interest. That statutes provides in pertinent part:

> "(10) In the case of a failure to file a report or return on the date prescribed therefore, the department shall determine the tax according to the best of its information and belief, assess the tax plus appropriate penalty and interest, and give written notice of the determination and assessment to the person required to make the filing. . . ."
>
> "(11) Mailing of notice to the person at the person's last-known address shall constitute the giving of notice as prescribed in this section. . ."
>
> "(14). . .Assessments and billings of taxes shall be final after the expiration of the appeal period specified in ORS 305.280, and payment of the tax shall not give any person extension of the period within which an appeal may be taken."

Oregon Revised Statute 305.280 is entitled **Time for filing appeal; alternate appeals procedures where permitted by ORS 305.515 to ORS 305.555**. That statute provides in pertinent part as follows:

> "(2) An appeal . . .from any notice of assessment or refund denial issued by the Department of Revenue. . . ., shall be filed within 90 days from the date of the notice. An appeal from a proposed adjustment under ORS 305.270 shall be filed within 90 days from the date the notice of adjustment is final."

Oregon Revised Statute 305.270 is entitled **Refund of excess tax paid; claim procedure**. That statutes provides in

pertinent parts as follows:

> "(1)* * * if the amount of tax shown as due on a report or return originally filed with the department * * * *or collected pursuant to ORS 305.620, or as corrected by the department is less than the amount theretofore paid, or if a person files a claim for refund of any tax paid to the department within the period specified in subsection (2) of this section, any excess tax paid shall be refunded by the department with interest as provided in this section and ORS 314.415."
>
> "(2)* * * * The claim shall be filed within the period specified in ORS 314.415(1)(b) for taxes specified * * *."

ORS 314.415 (1)(b) provides in part that "No refund shall be allowed or made after three years from the time the return is filed, or two years from the time the tax or a portion thereof, was paid, whichever period expires the later, unless before the expiration of such period a claim for refund is filed by the taxpayer in compliance with ORS 305.270, * * * *"

Oregon Revised Statute 305.295 is entitled **Cancellation of tax, penalty or interest**. That statute provides in pertinent part as follows:

> "(6) A taxpayer may appeal denial of a request for cancellation of assessment or refund to the director. The decision of the director is final and may not be

appealed.

STATEMENT OF THE CASE

It is the practice and procedure of the State of Oregon that all taxpayers, resident and nonresident, are prohibited from contesting an erroneous or illegal tax assessment unless an appeal is taken to the Director of the Oregon Department of Revenue within 90 days from the date of the original notice of assessment.

Taxpayers who do not receive the original notice because the notice is sent to a "last known address" that is no longer valid have no ability to later obtain a review of an erroneous or illegal assessment.

During the calendar year 1985, petitioner did not work in the State of Oregon or have any income from Oregon sources. Further, petitioner asserts that he was not a resident or citizen of the State of Oregon during 1985 as well as the years immediately prior and subsequent thereto. He worked and lived in the states of Washington and Montana during the year of 1985. He was in Oregon in 1985 for purposes of visiting a friend after getting a divorce and losing his job in the State of Idaho in late 1984. Also, he stayed at his friend's home while going through outpatient treatment at a Veterans Administration hospital. In April 1986, he filed a timely federal income tax return showing an Oregon address.

In late 1988, Oregon, through an agreement for exchange of

information with the Internal Revenue Service, learned that petitioner had filed a timely 1985 federal tax return using an Oregon address. Based on that information, Oregon determined that petitioner was required to file an Oregon income tax return in 1985 and had failed to do so. In July 1989, the Oregon Department of Revenue ("department") issued petitioner a notice of determination and assessment pursuant to ORS 305.265(10). The department mailed the notice to an address contained on what was then an old outdated IRS transcript showing the address petitioner used on his 1987 federal income tax return. At the time respondent mailed the notice of assessment, petitioner's current Arkansas address was available and on file with the Internal Revenue Service. The United States Post Office returned the notice of assessment to respondent with the notation "Attempted - Not Known". Respondent did not request a current transcript from the Internal Revenue Service in order to obtain the most current address on file. Petitioner did not learn of the tax assessment until 1990 when he attempted to obtain a loan and learned of the tax lien on his credit report. This was long after the expiration of the 90 day appeal period.

In April 1991, petitioner appealed the 1985 tax assessment to respondent. Respondent held that it would not disturb the final assessment because (1) petitioner had not appealed from the notice of determination and assessment within 90 days, as required by statute, and (2) petitioner was a resident of the State of Oregon in

1985.[1]

Petitioner filed a pro se complaint in the Oregon Tax Court to appeal respondent's determination. The Oregon Tax Court held that plaintiff was a resident during the year of 1985 and sustained the director's order and opinion. Petitioner then sought review in the Oregon Supreme Court. Petitioner argued that (1) he was not a resident of Oregon in 1985, (2) department did not mail the notice of assessment to his last known address because it failed to make an appropriate and reasonable inquiry, and (3) that the department violated his rights to due process by refusing to provide him with a meaningful opportunity to appeal the assessment and obtain a judicial review.

The Oregon Supreme Court held that respondent exercised reasonable diligence in determining petitioner's last known address and that the Oregon Tax Court lacked jurisdiction to review petitioner's claim on the merits because he did not exhaust his administrative remedy of appealing the notice of assessment within 90 days from its date. The Oregon Supreme Court then vacated the decision of the Tax Court and remanded the case with instructions

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[1] Respondent's finding as written by the hearings officer who conducted the hearing and received testimony was that petitioner was not a resident of Oregon in 1985 (app. 24a). The holding was subsequently changed by a hearings officer who did not participate in the appeal.

to dismiss the proceeding.

REASONS FOR GRANTING THE PETITION

This petition presents questions of substantial public importance concerning the legality of states taxing nonresident individuals on income received in another state by declaring the individual to be a resident and then denying the individual a meaningful opportunity to obtain a judicial review of the agency determination. Further this petition concerns the issue of what notice is required to protect a citizen's right to due process when States make final assessments that are not subject to appeal or judicial review. Currently, twelve states[2] and the District of Columbia do not permit taxpayers to challenge a notice of assessment if an appeal is not filed within the prescribed period for appealing the initial assessment determination. The reason for the failure is of no consequence. Accordingly, taxpayers who receive the notice of assessment and ignore it are treated the same as taxpayers who do not receive it because they are in a coma, are seriously ill, have long before moved, are divorced with an uncooperative or unfriendly ex-spouse, or any other number of valid reasons.

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[2]Arkansas, Hawaii, Idaho, Montana, Nebraska, New Jersey, North Dakota, Oklahoma, Oregon, South Dakota, Vermont & West Virginia.

I. OREGON'S TAX ASSESSMENT NOTICE PROCEDURES VIOLATE THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

The State of Oregon, like all states and the federal government, provides that notices of tax assessments are to be mailed to the taxpayer's last known address. However, unlike the federal government and the majority of other states, Oregon's tax assessments become final after 90 days from the date of the notice of assessment and are not subject to appeal or protest after that time frame passes. Thus, if an individual does not receive the notice of assessment for whatever reason, he or she can not appeal or contest the assessment within the department or judicially in the courts. This is true even if the department later acknowledges that the tax is incorrect. The individual still must pay the total amount of tax, penalty and interest assessed and has no right to claim a refund. *Van Tran v. Dept. Of Rev.*, 320 Or 170, 174, 880 P2d 924 (1994), *cert den* 63 USLW 3625 (US 1995).

Petitioner did not ignore the Notice of Determination and Assessment the department mailed to him. He, like many people, moved and his forwarding address expired before the department mailed the notice. Yet, solely because he did not receive the notice and therefore did not appeal the assessment within 90 days, Oregon prohibits him from challenging the correctness and legality of the assessment.

The Oregon Supreme Court held in its opinion that the department used reasonable diligence in obtaining petitioner's last known address. (App. at 8a). Petitioner disagrees and argues that what is reasonable depends on the availability of postdeprivation appeal opportunities. The United States Court of Appeals for the Eighth Circuit addressed the adequacy of a notice of assessment sent by certified mail to the taxpayer's last known address when the notice was never received and was later returned undelivered. *Morse v. IRS*, 635 F.2d 701 (8th Cir 1980). In *Morse*, the court held the notice to be adequate under the Constitution because the taxpayer was not without adequate remedy as he still had the opportunity to pay the amount assessed, file a claim for refund and, if the claim was denied, institute an action in the United States District Court. *Id.*, at 703. The *Morse* court looked to this Court for authority in the case of *Phillips v. Commissioner*, 283 U.S. 589, 596, 51 S.Ct. 608, 75 L.Ed. 1289 (1931). Accordingly, petitioner asserts that where states like Oregon make assessments which can only be appealed within a limited time period measured from the notice of assessment, the adequacy of the notice address is vital to protect the due process rights of individuals subject to state asserted tax assessments.

The Oregon court stated that it believed that the department used reasonable diligence by requesting an address from the Internal Revenue Service and verifying the address with old records

of the Oregon Department of Motor Vehicles (app at 8a). Petitioner strongly disagrees and would argue to this Court that it should hold Oregon to a higher standard of reasonable diligence in establishing an individual's last known address than what it might require of states which allow for a postdeprivation appeal procedure. It is the Oregon legistature that has limited the appeal process so that receipt of the notice is mandatory in order for individuals to have an adequate opportunity to correct mistakes.

The Oregon Supreme Court recognized in its opinion in this case that it is the written policy of the department to get last-known address information from the IRS (app. at 6a). The policy as contained in OAR 150-305.265(11) specifically states that (1) Notices are required to be mailed to the last known address, (2) the department shall use the address on the most recently filed return as the last know address, and (3) when the department has received information that the last known address is incorrect or outdated; the department may use IRS information when the date of the IRS information is more recent than the department information. In petitioner's case, the department used an old outdated address it obtained from the IRS in 1988 to mail out its notice of assessment in July 1989. If it did not occur to department employees that the address used for the notice of assessment was incorrect or outdated when the notice was mailed, they certainly should have when the Post Office returned the notice marked "Attempted - Not Known".

It was that notice that started the appeal clock running. Petitioner argues that the department did not use reasonable diligence in determining his last-known address in July 1989 because it did not request his most current address information from the IRS for its assessment notice. The IRS information would have contained his Arkansas address as shown on his 1988 federal return filed in early 1989. Requesting the most current information would not only be reasonable but extremely important to protect citizens of other states, like petitioner, from having to pay taxes that they do not owe. Because the assessment becomes final after a short appeal period, it is vital to taxpayers that the department use greater care and diligence in determining the last-known addresses for its assessment notices. In fact, it may well be that because final assessments are not correctable, that actual notice is required to satisfy due process requirements. This is especially so when the year subject to assessment is several years old and the information on which the assessment is based is only that a person used an Oregon address on a federal tax return. It is important to understand that tax returns are not filed in the same year for which income is being reported. Accordingly, the address an individual uses on his tax return for tax year 1985 would relate more to his residency in 1986 than it would for 1985.

II. OREGON VIOLATES THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT BY NOT ALLOWING JUDICIAL DETERMINATIONS OF ADMINISTRATIVE RULINGS ON RESIDENCY ON WHICH TAX ASSESSMENTS ARE BASED.

In its opinion in this case, the Oregon Supreme Court held that once the Oregon Department of Revenue determines that an individual is a resident of Oregon for tax purposes, the individual has no right to have that decision subjected to a judicial determination unless an appeal is filed within 90 days of the notice of assessment. An act which was impossible in petitioner's case since it would have been clairvoyant of him to have filed an appeal of an assessment he did not know existed within that short time frame.

The Oregon Supreme Court construed the law in Oregon to be that the courts have no jurisdiction to review agency determinations of residency after the initial 90 day appeal period expired. (App at 11a). Department decisions based on questions of law and fact regarding residency issues are not reviewable by Oregon courts. Petitioner had no income in 1985 from Oregon sources. Accordingly, Oregon would only subject his out of state income in 1985 to taxation should he be an Oregon resident. As a nonresident or part-year resident, he would owe no Oregon taxes. For that reason, it may well be that a tax raising and collecting agency would not be disposed to providing an objective

determination of residency based on the law and facts if its determinations were not subject to subsequent judicial review. Petitioner asks this Court to take note that in his case the hearings officer that conducted the appeal conference wrote his opinion finding him *not* to be a resident of Oregon. (App. at 23a). That decision was later changed by another hearings officer who did not participate in the hearing or receive the testimony. (App. at 16a). This is hardly an objective and meaningful opportunity to obtain a review of whether or not he was legally a resident of Oregon for tax purposes. Petitioner argues that a judicial review is required to meet the requirements of due process. Taxation is unquestionably a taking of property by the government. It is entirely possible under the existing laws in Oregon for the government taxing agency in need of additional revenue to assess taxes against citizens of other states by declaring them to be residents of Oregon, if no judicial review had to be afforded. Petitioner believes that this is precisely what has happened in his case.

Petitioner's situation would not constitute a violation of his rights to due process if Oregon provided individuals with the same opportunities to file postdeprivation appeals as does the Internal Revenue Service and as the majority of other states - to pay the tax assessment and additions and then file a claim for refund. By allowing such administrative appeal procedures, the failure to receive notification of the assessment is not irreversible should the

tax be illegal, incorrect or exaggerated.

This Court considered the issue of alternative predeprivation and postdeprivation appeal procedures as they relate to violations of due process requirements under the Fourteenth Amendment to the Constitution of the United States in the case of *Phillips v. Commissioner*, 283 U.S. 583 (1931). Mr. Justice Brandeis writing for the court held that the summary collection procedure was constitutional because two alternative methods of eventual judicial review were available under the federal statute at issue. Id. at 589. Specifically, the Court recognized that the statute provided taxpayers with an opportunity to obtain a judicial review by either (1) appealing from the determination of the Commissioner, or (2) having not appealed the assessment, paying the tax and bringing an action against the United States. *Id.* at 589-90.

Like the federal statute in *Phillips*, the Oregon Revised Statues provide for two alternative methods to obtain eventual judicial review. However, Oregon does not allow taxpayers to use one without simultaneously using the other. ORS 305.265 provides taxpayers with the opportunity to appeal the notice of determination of assessment to the Oregon Department of Revenue at the onset. ORS 305.270 provides taxpayers with the opportunity to file claims for refund and to appeal denials of claims within the Oregon Department of Revenue. ORS 305.560 provides taxpayers with the opportunity to obtain a judicial review of any Order (with one

exception which does not apply in this case) of the Oregon Department of Revenue arising under ORS Chapter 305.

Respondent argues that the administrative remedy by which taxpayers may appeal the notice of assessment is sufficient to meet the requirements of due process. Petitioner disagrees for three reasons. First, the administrative process provides taxpayers with the opportunity to have a hearing before an Oregon Department of Revenue Hearings Officer prior to paying the tax. The determination of the Hearings Officer is not final and is subject to change by the Director of the Oregon Department of Revenue. Second, taxpayers may then appeal this determination to the Oregon Tax Court to obtain a judicial review of the assessment, but only after paying the tax or obtaining a hardship exception to the payment of the tax. Third, if taxpayers for any reason fail to appeal the assessment at the onset, they are prohibited from later paying the tax and filing a claim for refund and filing a complaint in the Oregon Tax Court. Respondent construes its refund claim statute to require taxpayers to pay the tax and file the claim during the same time period for filing an appeal of the notice of assessment. For reasons before stated this may not be possible or feasible. Thus, Oregon's refusal to provide its taxpayers with an alternative remedy to contest assessments and thereby provide them with an opportunity for a judicial determination of the legality and correctness of assessments imposed upon them cannot pass muster

under the Due Process Clause of the United States Constitution.

III. OREGON DOES NOT PROVIDE TAXPAYERS WITH OPPORTUNITY TO OBTAIN JUDICIAL REVIEW OF TAX DEFICIENCY ASSESSMENTS.

This Court, in questions involving the legality of state tax assessments under the Constitution of the United States, has consistently held that taxpayers must be provided with an opportunity to obtain a meaningful review of the legality of assessments. *Reich v. Georgia*, 1994 WL 675214 (1994); *Harper v. Virginia Department of Taxation*, ___ U.S. ____, 113 S.Ct. 2510 (1993); *McKesson Corp. v. Div. Alcoholic Beverages and Tobacco*, 496 U.S. 18, 110 S.Ct. 2238 (1990).

In *Reich v. Georgia*, this Court held that what a state specifically may not do is "hold out what plainly appears to be a 'clear and certain' postdeprivation remedy and then declare. . . that no such remedy exists." This is what Oregon is doing not only to its taxpayers, but unfortunately to the citizens of other states as well. ORS 305.270 specifically provides taxpayers with the opportunity to contest tax assessments, including those corrected by the Oregon Department of Revenue, by paying the taxes first and then filing a claim for refund. There is no limitation in the refund claim statute indicating that this remedy is not available to taxpayers who did not appeal from the notice of deficiency assessment. Accordingly, the practice of Oregon refusing to

provide its taxpayer's with the "clear and certain" remedy set fourth in ORS 305.270 cannot stand under this Court's decision in *Reich v. Georgia.*

IV. PETITIONER EXHAUSTED ADMINISTRATIVE REMEDY BEFORE SEEKING JUDICIAL REVIEW.

Petitioner did not fail to exhaust his administrative remedies. He appealed the assessment when he learned of its existence. As stated above, the Oregon statutes provide two alternative methods for appealing a notice of assessment. While petitioner did not avail himself of the remedy of appealing the notice of assessment, he filed a proper and timely administrative claim for refund pursuant to ORS 305.445. If petitioner had paid the tax first and filed a claim for refund, the result would not have changed. It would have been an act that would have no meaning to the Oregon Supreme Court. Specifically, the Oregon court recently held that the payment of tax does not afford a taxpayer with any postdeprivation appeal procedure; even though ORS 305.270 provides for such a remedy. *Van Tran v. Dept. of Rev., supra.* Petitioner is not arguing that he is entitled to two opportunities to obtain a judicial review of the correctness of the assessment imposed upon him. Rather he argues that the Oregon statutes provide him with two alternative administrative remedies and a procedure to obtain a judicial review after exhausting the remedy selected. Further he argues that federal

due process requires that Oregon provide him with the alternative postdeprivation remedy to obtain a judicial review if he does not appeal the initial assessment determination because he did not receive notification.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari to the Supreme Court of Oregon should be granted.

Respectfully submitted,

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